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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 496

FREDERICK WILLARD THOMPSON,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FREDERICK WILLARD THOMPSON, petitioner below, asks this Court to review an order of the Court of Appeals for the Seventh Circuit. Petitioner had appealed an adverse judgment in the District Court on a petition for naturalization. The Court of Appeals dismissed the appeal for lack of jurisdiction. Petitioner seeks to reverse the order so as to have a determination on the merits of his appeal.

OPINIONS BELOW.

The opinion below is reported in 318 F. 2d 681, and is set out in full in Appendix A. The findings of fact, conclusions of law, and judgment, and the respective orders denying post-trial motions, entered by the District Court are not reported.

THE RECORD.

A certified copy of the record and supplemental record below has been filed in this Court. Printing was dispensed with below by order of the Court of Appeals.

This petition does not deal with the merits of the case, but with the question of whether the Court of Appeals had jurisdiction to hear the appeal.

JURISDICTION.

This petition is presented for review of the judgment of the Court of Appeals entered on June 20, 1963, and the jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED.

1. Whether the Federal Rules of Civil Procedure apply to naturalization proceedings prior to appeal so as to require post-trial motions to be filed within ten days of entry of judgment in order to toll the time for filing notice of appeal.

2. If the Rules apply,

(a) whether motions under F. R. C. P. 52 and 59 toll the time for filing notice of appeal under F. R. C. P. 73(a), if served within ten days of receipt of notice of entry of the judgment, or

(b) Whether the time for filing notice of appeal is tolled when the trial court declares that the post-trial motions are timely, and the Government does not object when they are filed, and

(c) Whether a motion to amend pleadings under F. R. C. P. 15(a) tolls the time for filing notices of appeal under F. R. C. P. 73(a).

STATUTES AND RULES.

Post-trial motions were served and filed under F. R. C. P. 52 and 59 (Appendix B-1), and notice of appeal was filed under F. R. C. P. 73(a) (Appendix B-2.). F. R. C. P. 81(a)(2) (Appendix B-3) provides the exceptions to the application of the Rules at the District Court level. Petitioner contends a post trial motion was filed under F. R. C. P. 15(a) (Appendix B). The statutes on procedure in naturalization cases are 8 U. S. C. A. Sections 1443(a), 1446(d), 1447(a) and (b), and 1451(j), and 8 C. F. R. 334.16(b) (Appendix C).

STATEMENT.

Petitioner, a Canadian national, filed a petition for naturalization on August 28, 1946. (R. 6.) The petition was referred to a Designated Naturalization Examiner, a member of the Immigration and Naturalization Service, for examination and recommendation to the District Court. Subsequently another Examiner was appointed, and at an administrative hearing the original Examiner presented the Government's case in opposition to the petition. (G. Ex. A., p. 1.) After the hearing, a recommendation against granting the petition was filed with the District Court. The recommendation was filed more than fifteen years after the petition for naturalization had been filed. (R. 29-50, at 49.)

A hearing on the petition and recommendation was held in the District Court on July 12, 1961. These were the only "pleadings" in the case. The Government was represented at the trial by both Designated Examiners below. (Tr. 1.) On April 18, 1962, the District Court issued findings of fact and conclusions of law, and judgment was entered denying the petition. That day copies of the findings, conclusions and judgment were mailed to respective counsel. (R. 110-122.) Counsel were not present on that date.

On Monday, April 30, 1962, the tenth court day from receipt of notice of entry of the judgment, counsel for petitioner served the Government with post-trial motions, under F. R. C. P. 52(b), to amend the findings, and F. R. C. P. 59(a), for a new trial. (App. 11.) The motions were presented in open court on May 2, 1962, and the Government was present by the original Examiner. (S. R. 1.) The District Court declared that the motions were filed "in ample time" (S. R. 3), and no objection as to timeliness was raised by the Government.

The parties filed briefs on the post-trial motions. In addition to the grounds set out under F. R. C. P. 52(b) and 59(a), petitioner in his brief raised (R. 131-132) the point that although the petition had been filed under the provisions of the Nationality Act of 1940, the District Court (R. 122) had denied the petition on the Government's recommendation under the Nationality Act of 1952. The Government responded in its answering brief (R. 154, 156-158, 160-164), and petitioner devoted his reply brief to this issue. (R. 171-190.)

On October 16, 1962, the District Court entered an order denying the post-trial motions, and the points raised in petitioner's briefs. Counsel for petitioner filed another post-trial motion on October 26, 1962, citing a case newly decided by the Court of Appeals for the Seventh Circuit, as additional authority in support of the motions. No objection to filing the additional motion was raised by the Government. The motion was denied on the day it was presented. (App. 12.)

Notice of appeal from the judgment of April 18, 1962, and from denial of the post-trial motions was filed pursuant to F. R. C. P. 73(a) on December 6, 1962, within sixty days of denial of the post-trial motions. Once the appeal was docketed the Government moved to dismiss. The Government argued that the original post-trial motions were not

filed within ten days of the judgment entered on April 18, 1962, and that time for filing notice of appeal from the judgment had therefore lapsed. The Court of Appeals took the motion with the case and on June 20, 1963, entered an order granting the Government's motion to dismiss. (Appendix A.)

REASONS FOR GRANTING THE WRIT.

1. Importance to the administration of naturalization proceedings. Do the Federal Rules of Civil Procedure apply to naturalization proceedings prior to appeal?

The provisions for proceedings on naturalization proceedings are set out in 8 U. S. C. A. Sections 1443(a), 1446(d), 1447(a) and (b) and 1451(j). Under these sections the petition is examined, and a recommendation made to the District Court, and there is a hearing on the petition and recommendation. The petition and recommendation are the only documents presented, and there are no other pleadings or proceedings as under the Federal Rules of Civil Procedure. Under these statutory provisions, naturalization proceedings are therefore excepted from the application of the Rules at the trial level. Rule 81(a) (2) provides:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship * * *."

Moore, Federal Practice, Vol. 7, Par. 81.05(3), 4436 states that naturalization proceedings are *sui generis*, and

> "81.05(3)—ADMISSION TO CITIZENSHIP.
>
> "Where a proceeding is had in open court the Rules are applicable insofar as the proceeding is not supplied by statute."

He also states that the trial court has power to grant a new trial or alter or amend the judgment, but he does not deal with the provisions of 8 U. S. C. A. set out above.

The Court below relied on *Application of Murra*, 7 Cir., 1948, 166 F. 2d 605, 606-607, where the Court reversed and remanded with instructions to the trial court to enter findings and conclusions so that there would be some basis for review. This requirement is provided for by statute, 8 U. S. C. A. 1446(d), and F. R. C. P. 52(a) need not be applied. This Section is not excepted from the application of Section 1447(b), providing for a hearing before the court. Finally under Section 1451(j), the statute limits the time for post-trial motions, and for application of the Rules only where naturalization is granted, but not where denied. The Court below, however, determined that the Rules must be applied to naturalization proceedings, and that the running of the ten-day period of F. R. C. P. 59(b) and (e) barred the appeal. The Court's ruling appears to be clearly erroneous.

2. Importance on the application of the Federal Rules of Civil Procedure. How is the time period for post-trial motions computed under F. R. C. P. 52(b) and 59(b) and (e)?

(a) If the Federal Rules of Civil Procedure do apply to naturalization proceedings prior to appeal, how is the time period computed under F. R. C. P. 52(b) and 59(b) and (e)? In this case motions were served within the ten court days of notice of the entry of judgment. In *Keohane v. Swarco, Inc.*, 6th Cir., 1963, ... F. 2d ..... (32 L. W. 2091), the Court of Appeals held that the time a post-trial motion was served, rather than the time it was filed, tolled the time for filing notice of appeal. The beginning of the time period should be from the time of

receipt of notice of the judgment. The "ten day" period would be defined uniformly and no other interpretation of the Rules would be required.

(b) When the post-trial motions were filed in this case, the trial court declared that they were filed "in ample time" (S. R. 3), and no objection as to timeliness was raised by the Government. In *Keohane* v. *Swarco, Inc.*, 6th Cir., ... F. 2d ..... (32 L. W. 2091), both the trial court and counsel for appellant were aware that post-trial motions were untimely there because of a premature notice of appeal. Yet the Court of Appeals held:

> "In our judgment, the motion to amend was timely made. It tolled the running of the time for appeal. * * * Rule 73."

The Court gave effect to the trial court's action, denied the motion to dismiss the appeal, made on the ground that time had not been tolled for filing notice of appeal, and granted the right to review. The Court said:

> "A decision on this case by our court ought not to be avoided on the basis of such technicalities."

citing *Foman* v. *Davis*, 1962, 371 U. S. 178, 181.

In the present case, if petitioner did serve his motions one court day late, he was deprived of the right to file a notice of appeal from the judgment itself when the trial court declared the motions timely, and when the Designated Examiner raised no objection. It is apparent that the Examiner also believed the motions timely, because after they were denied on October 16, 1962, he did not raise any objection when petitioner filed a subsequent motion on October 26, 1962. The Designated Examiner has been held to have a special role, analogous to a master in chancery, *In re Jow Ginn*, 7th Cir., 1949, 175 F. 2d 299, 301, yet no objection was made to the filing of the motions

while petitioner had the right to file notice of appeal from the judgment of April 18, 1962. The Court below relied on cases where the motions were filed well out of time and where there was no basis for belief that they were timely.

3. Importance of the effect of a post-trial motion to amend pleadings. Does a post-trial motion under Federal Rule of Civil Procedure 15(a) toll the time for filing notice of appeal?

In the opinion below the Court of Appeals agrees that a motion to amend pleadings under F. R. C. P. 15(a) would toll the time for filing notice of appeal under F. R. C. P. 73(a). (App. A, 15.) However, the Court decided that no formal motion had been made in this case, and also that there was no basis for such a motion because it was not "the sufficiency of appellant's petition for naturalization" raised (App. A, 15-16), but the sufficiency of the Government's recommendation that the petition be denied.

In his brief in support of the post-trial motions petitioner noted for the first time that although the petition was filed under the Nationality Act of 1940, it was decided under the Nationality Act of 1952, and he asked that the trial court's findings and conclusions be amended. (R. 131-132.) The Court of Appeals below refused to consider this question because no formal motion under F. R. C. P. 15(a) was ever made. However, it is apparent from the briefs that in effect the parties were dealing with such a motion, and as in *Foman* v. *Davis*, 1962, 371 U. S. 178, 181-83, the action of the parties, and not the title of the pleadings, alone governs. The Court should have recognized this fact.

Further, under statutory proceedings in 8 U. S. C. A., Sections 1443(a) and 1446(d), petitioner had no choice but to ask to amend the recommendation, since under these

sections there are no other pleadings in the proceedings. 8 C. F. R. 334.16(b) (App. C. 20), adopted pursuant to section 1443(a), provides for amendment to the petition after hearing, and adopts the time period in F. R. C. P. 15(a), yet if the Court of Appeals is correct that Rule 15(a) cannot apply to naturalization proceedings, because there are no pleadings as such, review should be granted here under point 1 (p. 5) above.

CONCLUSION.

Petitioner asks this Court to grant review because of the important questions raised on application of the Federal Rules of Civil Procedure, and on application of these Rules to naturalization proceedings.

Respectfully submitted,

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Appendix A.

318 F. 2d 681 (1963).

Frederick Willard Thompson,
Petitioner-Appellant,
vs.
Immigration and Naturalization Service,
Respondent-Appellee.

No. 14054.

UNITED STATES COURT OF APPEALS,
Seventh Circuit.

June 20, 1963.

PLATT, *District Judge.*

This is an appeal from an order of the District Court denying appellant's petition for naturalization. The cause was heard de novo in open court on the appellant's petition for naturalization as provided by Title 8 U.S.C.A. § 1447. Appellant presented two witnesses who testified as to his qualifications to become a citizen. The Government cross-examined these witnesses and offered certain documents which were admitted in evidence. The case was taken under advisement by the District Court.

On April 18, 1962, the District Court entered its findings of fact, conclusions of law, and order denying the petition for naturalization. Twelve days later, April 30, 1962, the appellant served a notice on the Immigration and Naturalization Service that he would appear in the District Court before the trial judge on May 2, 1962, and present a motion. This motion was in part as follows:

> "Now comes the petitioner, Frederick Willard Thompson, by his attorney, Marshall Patner, and moves the court to amend certain findings of fact pursuant to Rule 52 F.R.C.P. and for a new trial pursuant to Rule 59 F.R.C.P."

Then follows a request for amendment of certain findings of fact and the striking of certain findings of fact entered by the District Court. The motion concluded:

> "Therefore, the specific Findings of Fact in paragraphs 4 through 11 should be stricken and the Conclusions of Law should be amended so as to allow the petition for naturalization.
>
> "The Court should therefore amend the Findings of Fact and Conclusions of Law and grant the petition or in the alternative, grant a new trial."

This motion was filed on May 2, 1962 and was heard on briefs. October 16, 1962, the Court denied the appellant's motion. The appellant filed a second motion October 26, 1962, to vacate the order of October 16, 1962, which was denied by the Court on that date. December 6, 1962, the appellant filed his notice of appeal.

The Government has filed a motion to dismiss the appeal because it was not timely. This motion must be determined before we reach the merits of the appeal.

[1] Petitioner's motion taken in its most favorable light to accomplish its aim must be considered as a motion to amend findings of fact, conclusions of law, and the entry of a final order allowing the appellant to be naturalized, pursuant to Rules 52(b) and 59(e) of Federal Rules of Civil Procedure, or in the alternative for a new trial under Rule 59(e). Rule 52(b) provides in part:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

Rule 59(b) and (e) provide in part:

> "(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. * * *"
>
> "(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

The appellant's motion was not filed within 10 days of the entry of the final order of the District Court as required by these rules.

[2] A proceeding for naturalization is a judicial proceeding and the order of the District Court denying a petition for naturalization is a final order the same as any other judgment of a court of record, and is appealable to the Circuit Court of Appeals. Tutun *vs.* United States, 1926, 270 U. S. 568, 46 S. Ct. 425, 70 L. Ed. 738.

[3] Appellant's notice of appeal failed to comply with Rule 73(a) of Federal Rules of Civil Procedure. Rule 73(a) provided in part:

> "(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States * * * or agency thereof is a party the time as to all parties shall be 60 days from such entry * * *. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: * * * or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or

> denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

Appellant's notice of appeal was filed December 6, 1961, which was more than sixty days from the entry of the final order by the District Court. Appellant did not file his motion within ten (10) days of the entry of the judgment in accordance with Rules 52(b) and 59(b) and (e), and therefore the running of time for appeal was not terminated by a timely motion. Rule 6(b) of Federal Rules of Civil Procedure does not permit the extension of time under Rules 52 (b), 59(b) and (e), and 73(a). Since the appellant's notice of appeal was not filed within the time required by Rule 73(a), this Court does not have jurisdiction to hear the appeal on its merits. Cf. Howard *vs.* Local 74, Etc., 7 Cir., 1953, 208 F. 2d 930; Fine *vs.* Paramount Pictures, 7 Cir., 1950, 181 F. 2d 300; Hulson *vs.* Atchison, T. & S. F. Ry. Co., 7 Cir., 1961, 289 F. 2d 726; Schlink *vs.* Chesapeake & Ohio Railway Co., 6 Cir., 1960, 276 F. 2d 116.

[4] The appellant maintains that a petition for naturalizations is "sui generis," (peculiar, and only one of its kind) and that Federal Rules of Civil Procedure are not applicable, citing Moore, 2 Ed., Vol. 7, Federal Practice, ¶ 81.05(a), page 4436. Appellant neglects to state from this paragraph the following:

> "Rule 81(a) (2) makes the Rules applicable to appeals. Where a proceeding is had in open court the Rules are applicable insofar as the procedure is not supplied by statute.
>
> • • • • •
>
> "The district court has the power to grant a new trial or alter or amend the judgment pursuant to Rule 59, or grant relief from the judgment in accordance with Rule 60 (b)."

Rule 60(b) applies only where there is inadvertence, newly discovered evidence or fraud, and is not applicable in the instant case. We have been unable to find any statute in Title 8 U.S.C.A., nor have we been cited any statute which avoids the application of Federal Rules of Civil Procedure. This Court has held that Rule 52(b) requiring the district court to make findings of fact and conclusions of law is applicable to naturalization proceedings. Application of Murra, 7 Cir., 1948, 166 F. 2d 605. Rule 73 providing for appeal is equally applicable. See Petitions of Rudder, 2 Cir., 1947, 159 F. 2d 695.

[5] Appellant further contends that Regulation 8 C.F.R. 334.16 provides an exception to the operation of Federal Rules of Civil Procedure in naturalization proceedings and refers to Rule 15 of Federal Rules of Civil Procedure, which does not fix any limit on the time within which his motion should have been filed. This Regulation provides in part:

> "(b) After final action on petition or application. Whenever an application is made to the court to amend a petition or application for naturalization after final action thereon has been taken by the court a copy of the application shall be served upon the district director having administrative jurisdiction over the territory in which the court is located, in the manner and within the time provided by the rules of court in which application is made."

Obviously, this Regulation is no answer to appellant's predicament in not filing a timely motion and notice of appeal. Even if we assume this Regulation refers to Rule 15 this does not aid the appellant. His motion did not seek to amend his petition for naturalization. Without favorable findings of fact, conclusions of law, and final order, or a new trial, the amendment of appellant's petition for naturalization would be futile.

Petitioner lastly contends that Foman *vs.* Davis, 1962,

371 U. S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222, illustrates that his motion and appeal were timely. The facts in that case were entirely different from the instant case. The District Court on December 19, 1960 dismissed the plaintiff's complaint for failure to state a claim upon which relief could be granted. December 20, 1960, the plaintiff filed motions to vacate the judgment and amend the complaint. January 17, 1961, the notice of appeal from the judgment of December 19, 1960 was filed. January 23, 1961, the District Court denied the petitioner's motion to vacate the judgment and to amend the complaint, and on January 26, 1961, the petitioner filed a second notice of appeal from the denial of these motions. The Court of Appeals held the first notice of appeal was premature in view of the pending motion to vacate and that the second notice of appeal was ineffective to review the judgment of December 19, 1960. The Supreme Court reversed the Court of Appeals and held that the two notices of appeal were sufficient to review the judgment of December 19, 1960, as well as the orders of January 23, 1961, although the second notice of appeal was ineptly drawn. 371 U. S. at page 182, 83 S. Ct. at page 230 the Supreme Court went into the merits of the appeal and said "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." The Supreme Court then held that the appellant was entitled to amend his complaint in accordance with Rule 15(a) of Federal Rules of Civil Procedure. In the instant case the notice of appeal was not timely filed, as were the notices of appeal in Foman, and this Court has no jurisdiction to determine this appeal on the merits. Furthermore, in the instant case the sufficiency of appellant's petition for naturalization was never involved, and Rule 15(a) is not applicable. Foman is simply not in point here.

This Court does not have jurisdiction of the appeal, and for the reason stated the appeal must be dismissed.

Appeal dismissed.

Appendix B.

B

15(a) [Post trial motions to amend pleadings.]

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52 "(b) Amendment. Upon motion of a party made not later than days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. * * *"

59(a) [Grounds for motion for new trial.]

59 "(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

"(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

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73 "(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of

the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or deny a motion for a new trial under Rule 59."

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81(a) (2) "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, * * *."

Appendix C.

8 U.S.C.A. Sections:

1443. "(a) The Attorney General shall make such rules and regulations as may be necessary to carry into effect the provisions of this Part and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. * * *"

1446. "(d) The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued, with reasons therefor. * * *"

"* * * The judge to whom such recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. * * *"

1447. "(a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the petitioner and the witnesses, except as provided in subsection (b) of this section, shall be examined under oath before the court and in the presence of the court. * * *"

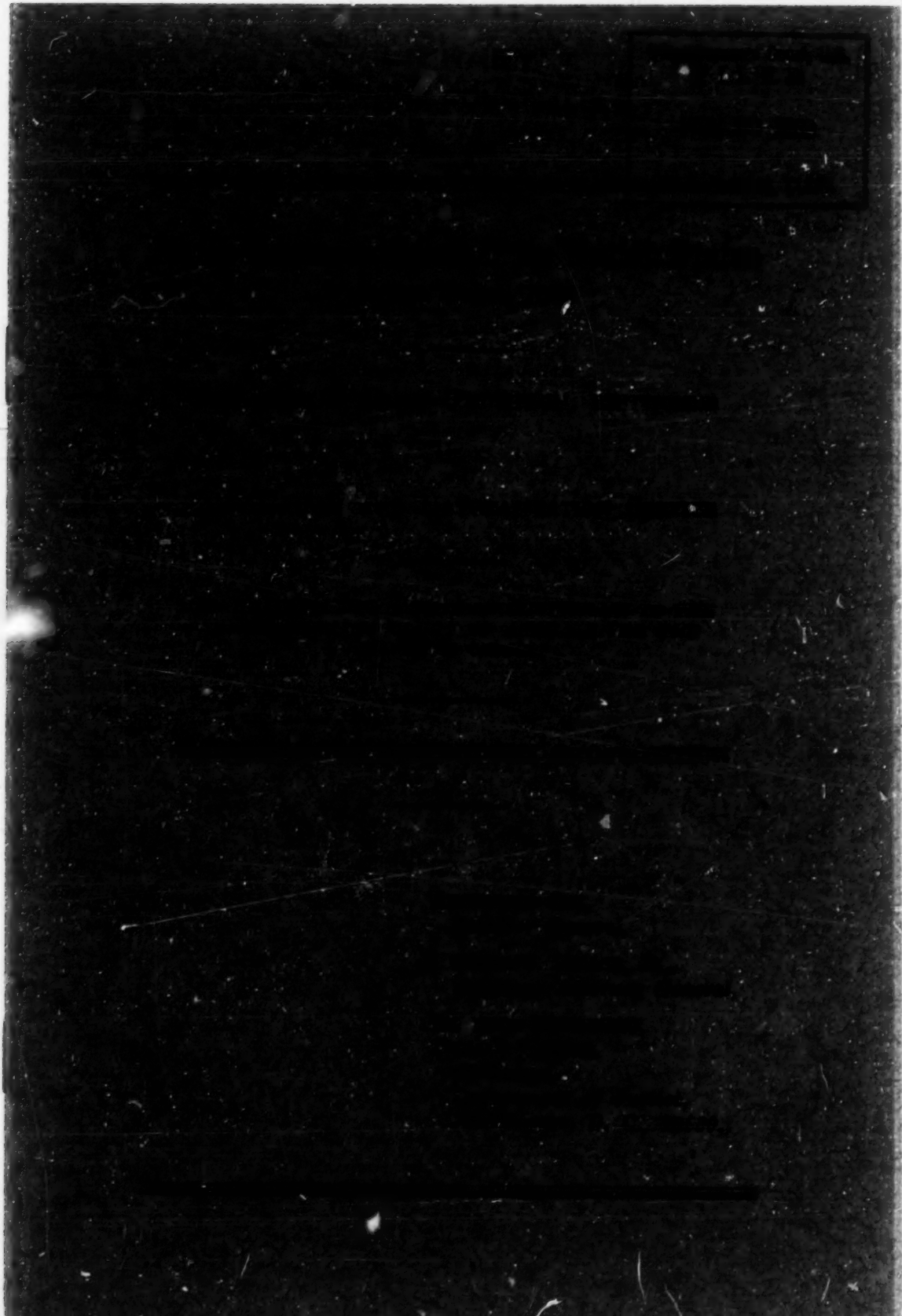
"(b) The requirement of subsection (a) of this section for the examination of the petitioner and the witnesses under oath before the court and in the presence of the court shall not apply in any case

where an employee designated under Section 1446(b) of this title has conducted the preliminary examination authorized by section 1446(b) of this title; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court."

1451. "(j) Nothing contained in this section shall be regarded as limiting, denying, or resricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within the time prescribed by the rules of procedure or statute governing the jurisdiction of the court to take such action."

8 C. F. R. 334.16 (b):

"(b) After final action on petition or application. Whenever an application is made to the court to amend a petition or application for naturalization after final action thereon has been taken by the court a copy of the application shall be served upon the district director having administrative jurisdiction over the territory in which the court is located, in the manner and within the time provided by the rules of court in which application is made."



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8 C.F.R. 334.16(b) 4, 11

Miscellaneous:

7 Moore, *Federal Practice* (2d ed.), 81.05 p. 4436 .. 9

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 496

FREDERICK WILLARD THOMPSON, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 318 F. 2d 681. The findings of fact and conclusions of law (R. 110) of the district court are reported at 209 F. Supp. 494.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1963. On September 18, 1963, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September

27, 1963, and the petition was filed on September 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion to amend findings and judgment, or in the alternative to grant a new trial, made more than 10 days after the entry of the judgment of the court denying naturalization, tolled the running of time for appeal under Rule 73(a) of the Federal Rules of Civil Procedure.

STATUTE, RULES AND REGULATIONS INVOLVED

The pertinent sections of the Immigration and Nationality Act of 1952, as set forth in Title 8 of the United States Code, are as follows:

> §1443. (a) The Attorney General shall make such rules and regulations as may be necessary to carry into effect the provisions of this Part and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. * * *
>
> §1446. (d) The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued. with reasons therefor. * * * The judge to whom such recommendationtions are submitted shall, if he approve

such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. * * *

§1447. (a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the petitioner and the witnesses, except as provided in subsection (b) of this section, shall be examined under oath before the court and in the presence of the court. * * *

(b) The requirement of subsection (a) of this section for the examination of the petitioner and the witnesses under oath before the court and in the presence of the court shall not apply in any case where an employee designated under section 1446(b) of this title has conducted the preliminary examination authorized by section 1446(b) of this title; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court.

§1451. (j) Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within

the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court to take such action.

8 C.F.R. 334.16(b) provides:

> (b) *After final action on petition or application.* Whenever an application is made to the court to amend a petition or application for naturalization after final action thereon has been taken by the court a copy of the application shall be served upon the district director having administrative jurisdiction over the territory in which the court is located, in the manner and within the time provided by the rules of court in which application is made. * * *

The pertinent Federal Rules of Civil Procedure provide:

Rule 73(a):

> * * * When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for ap-

peal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

Rule 52(b):

> * * * Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. * * *

Rule 59:

> (b) * * * A motion for a new trial shall be served not later than 10 days after the entry of the judgment. * * *
>
> (e) * * * A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. * * *

Rule 6(b):

> * * * When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without mo-

tion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. * * *

Rule 15(a):

> * * * A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *

STATEMENT

Petitioner, a native and national of Canada, filed a petition for naturalization on August 28, 1946, under the provisions of Section 310(b) of the Nationality Act of 1940 (8 U.S.C. 710(b), now 8 U.S.C. 1430) (R. 7-8). On his motion for a *de novo* hearing pursuant to 8 U.S.C. 1447 the cause came before the United States District Court for the Northern District of Illinois on July 12, 1961 (Tr. 1). On April

18, 1962, the court denied the petition for naturalization. On the same day it entered findings of fact and conclusions of law which recited, *inter alia*, that petitioner had failed to establish his attachment to the principles of the Constitution (R. 110-122). *In Re Thompson's Petition*, 209 F. Supp. 494.

Twelve days later, on April 30, 1962, petitioner served notice on the Immigration and Naturalization Service that he would appear before the trial judge on May 2, 1962, and present a motion (R. 124). The motion, which requested the court "to amend certain findings of fact pursuant to Rule 52 F. R. C. P. and to grant a new trial pursuant to Rule 59 F. R. C. P."[1] (R. 125), was filed on May 2, 1962 (R. 125) heard on briefs (R. 131, 153, 171), and denied on October 16, 1962, (R. 191). On October 26, 1962, a second motion filed by petitioner asking the court to vacate its order of October 16, 1962 (R. 193) was filed and denied (R. 194).

On December 6, 1962, petitioner filed a notice of appeal (R. 195). On June 20, 1963, the court of appeals, on the government's motion, dismissed the appeal on the ground that notice of appeal had not been

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[1] The motion, after requesting the amendment and striking of certain findings of fact entered by the trial court, concluded (R. 125):

"Therefore, the specific Findings of Fact in paragraphs 4 through 11 should be stricken and the Conclusions of Law should be amended so as to allow the petition for naturalization.

"The Court should therefore amend the Findings of Fact and Conclusions of Law and grant the petition or in the alternative, grant a new trial."

filed within the sixty-day period prescribed by Rule 73(a) of the Federal Rules of Civil Procedure and that petitioner's motion whether viewed as one for a new trial under Rule 59(b), or as one to alter or amend findings or judgment (under Rule 52(b) or 59(e)) was untimely and hence did not toll the running of the time for appeal. (Pet. App. A).

ARGUMENT

1. Petitioner does not question the applicability of Rule 73(a) of the Federal Rules of Civil Procedure to appeals in naturalization cases. Nor does he deny that, in the absence of a motion tolling the time for filing an appeal, his notice of appeal (filed on December 6, 1962, more than 60 days after the entry of the district court's order of April 18, 1962) would be untimely (*supra*, pp. 4-5). His contention is that the Federal Rules do not govern naturalization proceedings prior to the appellate stage, and hence that the filing of his post-trial motion to amend findings and judgment (or for a new trial), though not complying with the time limitations of Rules 52(b) and 59(b) and (e), nonetheless did toll the running of time under Rule 73(a). That argument, however, is wholly self-defeating. For, under Rule 73(a), the only post-trial motion which suspends the running of time for appeal is a "timely motion made pursuant to any of the rules hereinafter enumerated [Rules 50(b), 52(b) and 59]" and the time for appeal is to be computed from the entry of an order "made upon a timely motion under such rules." And, indeed, petitioner himself

specifically characterized his first motion as one made pursuant to Rule 52 and 59 of the Federal Rules of Procedure.

In any event, it is clear that the Federal Rules do apply to post-trial motions in naturalization proceedings. Rule 81(a)(2) provides that the Federal Rules govern enumerated proceedings (including "admission to citizenship"), but are "not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States * * *." See also 7 Moore, *Federal Practice* (2d ed.), 81.05, p. 4436. The obvious purpose of that Rule is to avoid a conflict between the procedure prescribed by the Federal Rules and that prescribed by statute. See *Application of Murra*, 166 F.2d 605, 606 (C.A. 7). None of the statutory provisions cited by the petitioner (8 U.S.C. 1443(a), 1446(d), 1447(a) and (b), 1451(j)[2]) sets forth a procedure for obtaining a new trial or an amendment of the findings or judgment, and hence none operates to displace Rules 52 and 59. On the contrary, the Rules complement the statutory provisions, as seems implicit in 8 U.S.C. 1451(j), which affirms the power of the court to correct or vacate its judgment "during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court * * *" (*supra*, pp. 3-4). There is no basis for believing that Congress intended to authorize post-trial motions in naturalization proceed-

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[2] Secs. 332(a), 335(d), 336(a) and (b), and 340(j), of the Immigration and Nationality Act of 1952.

ings without regard to time limitations, a procedure which would indefinitely extend the time for filing an appeal.

2. There is no merit in petitioner's contention that, assuming the Rules do apply, the filing of his motions tolled the time for filing notice of appeal under Rule 73(a) since (1) such motions were served within ten days of receipt of notice of entry of judgment and (2) the trial court declared the motions were timely filed and the government voiced no objection as to timeliness.

Petitioner served notice on the 12th day after the entry of judgment that he would file a motion to amend findings of fact and conclusions of law, or in the alternative for a new trial. The motion was not actually filed until the 14th day. Since it was neither served nor filed within the 10-day period fixed by the rules, it was clearly out of time under the provisions requiring that it be "made" (Rule 52(b)) or "served" (Rule 59(b) and (e)) "not later than 10 days after entry of the judgment". Cf. *Keohane* v. *Swarco, Inc.* (C.A. 6), decided August 5, 63, 32 U.S.L. Week 2091. Under no circumstances can this be read as fixing the running of the time from the date of the receipt of notice of the entry of judgment. Cf. *United States* v. *Erie County*, 8 F.R.D. 493 (W.D. N.Y.). The term "entry of the judgment" has a definite meaning in the Rules (see Rule 58) and in the statutes governing naturalization cases (8 U.S.C. 1447(a), see p. 3, *supra*).

Neither the action of the court with respect to the motion, nor the failure of the government to object to

its timeliness, is of legal significance. Rule 6(b) of the Federal Rules of Civil Procedure (see p. 5, *supra*) does not permit the extension of time under Rules 52(b), 59(b) and (e) and 73(a). Opposing counsel could not waive the strict requirements of the rules fixing the time for filing post-trial motions *Hulson* v. *Atchinson T. & S. F. Ry. Co.*, 289 F.2d 726 (C.A. 7), certiorari denied, 368 U.S. 835. And the district court could not extend the time for appeal by entertaining and ruling on an untimely motion. *Raughley* v. *Pennsylvania Railroad Co.*, 230 F. 2d 387 (C.A. 3).

3. There is no occasion to consider whether a motion to amend the pleadings under Rule 15(a) of the Federal Rules suspends the running of time under Rule 73(a) and, if so, whether an application to amend a petition for naturalization (8 C.F.R. 334.16 (b), *supra* p. 4) would be deemed a Rule 15 (a) motion. No such application was filed here. What petitioner sought to have amended was not his petition for naturalization—the only document which might qualify as "his pleading" within the meaning of Rule 15(a)—but the findings and conclusions of the district court. As the court of appeals pointed out (Pet. 15), "Without favorable findings of fact, conclusions of law, and final order, or a new trial, the amendment of appellant's petition for naturalization would be futile."

The case of *Foman* v. *Davis*, 371 U.S. 178, is inapposite. There a specific request was made after judgment to amend the complaint to state an alternative theory forming a basis for favorable relief. The

motion to amend was accompanied by a timely motion to vacate the judgment under Rule 59(e), which unquestionably suspended the running of time for appeal and, indeed, rendered an earlier notice of appeal premature. This court held that the premature notice, together with a timely but ineptly drawn second notice, gave the court of appeals reason to treat the appeal as effective. That holding lends no support to the petitioner here, for in the present case there was no motion to amend the complaint and no timely notice of appeal.

CONCLUSION

The court below correctly held that it had no jurisdiction to determine petitioner's appeal on the merits. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Respondent.

REPLY TO GOVERNMENT'S ANSWER TO PETITION FOR CERTIORARI.

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REPLY TO GOVERNMENT'S ANSWER TO PETITION FOR CERTIORARI.

Petitioner files this reply brief to clarify two statements in the government's answering brief that may be misleading.

1. Petitioner argues that his post trial motions were served within the ten day period under F. R. C. P. 52(b) and 59(b) and (e) because notice of these motions was served on the 10th court day after counsel was notified that judgment had been entered by the trial court (P. Br. par. 2(a), pp. 2, 6-7). The government, however, considers only calendar days, computed from the date the judgment was entered, and states (G. Br. p. 11): "Petitioner served notice on the 12th day after the entry of judgment . . ." This statement ignores the fact that the trial court had taken the case on briefs, after hearing evidence, and that

neither counsel was present in court when judgment was entered on Tuesday, April 18, 1962. Counsel for both parties therefore first received notice that judgment had been entered the following day by mail. The government's statement also ignores the fact that the 10th day after counsel received notification of the judgment was Sunday, April 29th, and not a court day. Notice of the post trial motions was served on Monday, April 30th, within 10 court days of notice of entry of judgment.

Petitioner contends that the time period under these Rules should be uniformly interpreted so that the 10 day period for serving post trial motions begins to run from the date of receipt of notice of the entry of a judgment. This is consistent with Rule 24.1 of this Court: "Counsel for the respondent shall have thirty days . . . after receipt of a petition, within which to file . . ." Notice of motion served within this period should therefore toll the time for filing notice of appeal under F. R. C. P. 73(a).

2. Further, in this case the trial court declared that the post trial motions were timely, and the government did not object. The government, however, states (G. Br. p. 10): "Neither the action of the court with respect to the motion, nor the failure of the government to object to its timeliness, is of legal significance." Yet in *Harris Truck Lines* v. *Cherry Meat Packers, Inc.*, 1962, 371 U. S. 215, this Court, in a per curiam opinion, reversed where an appeal had been dismissed because the trial court had extended the time for notice of appeal, contrary to the Rules, and where counsel had relied on the court's action. In that case the request for the extension was made within the time for notice of appeal, and if the request to extend the time had not been granted, counsel could still have filed. In the present case, if the trial court had not declared the post trial motions timely, petitioner could then have filed notice of appeal from the judgment.

Petitioner therefore asks this Court to grant review, on the other grounds stated in the petition, or as stated here, to hold that the post trial motions were timely, either because of the trial court's action, or because notice was served within ten days after counsel was notified that judgment had been entered, and petitioner asks this Court to reverse and remand this case for a hearing on the merits of petitioner's qualification to become a citizen of the United States.

Respectfully submitted,

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